Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-114

UNITED STATES OF AMERICA, PETITIONER

v.

FELIX HUMBERTO BRIGNONI-PONCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 13, 1974
CERTIORARI GRANTED OCTOBER 15, 1974

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INDEX

	Page
Docket entries	1
Indictment	3
Excerpts from the trial transcript	5
Stipulation and order	10
Judgment and commitment	11
Opinion of the court of appeals	13
Judgment of the court of appeals	18
Order granting certiorari	19

Docket Entries

3-14-73	1—Ent ord and fld Ind. JS-2 Bond Fixed at $7,500 (CORP) (CASH)
	2—Fld Order Appointing Attorney Fed Defs
	3—Fld Order Appointing Attorney Bertha Carlos as to mat wits.
3-15-73	4—Filed Magistrates Transcript
3-16-73	5—Deft arraigned. Ord set for O/H for 3-20-73 @ 10 a.m. Ord assigned to Judge TURRENTINE. Plea: NG, all cts. (McCUE)
	6—BAIL REVIEW—Affirmed. BAIL REVIEW as to mat wits—Affirmed; cont'd to 3-26-73 @ 9 a.m. mat wit. ELSA MARINA HERNANDEZ-SERABIA does not have to appear this date. (HARRIS)
3-20-73	7—Omnibus Form fld. Ord. assigned to Judge TURRENTINE for Jury Trial setting on 3-20-73 @ 9 a.m. (McCUE)
3-26-73	8—Ent Ord cont'd to 4-24-73 @ 2 p.m. for mots. (T)
3-30-73	9—BAIL REVIEW—Affirmed. Cont'd to 4-25-73 @ 9 a.m. (HARRIS)
4-12-73	10—JURY TRIAL—Jurors impaneled & sworn. Swore wits. fld exhibits. Fld deft's requested questions for Voir Dire. Fld Govt's requested jury instrs. Ent mot for J/A—DENIED. Verdict: G both cts. Jury polled. Ent ord ref to P/O for I/R & cont'd to 5-14-73 @ 9 a.m. for sent. (T) Fld verdict.
4-13-73	11—Fld ORD releasing & Exonerating Bonf of mat wits (2) & dismissing complt. (HARRIS) Issd c.c. of ORD to U.S. Mars.
5-14-73	12—Ent Ord I.S.S. on Ct. 2, & 5 yrs. prob. Ent ord on Ct 1 Comm to Cust AG for 4 yrs. Impris. purs to 18:4208(a)(2). (T) JS-3. (ENT 5-16-73)
	13—Fld judgment, issd cys. (ENT 5-16-73)

5-20-73 14—Fld Judgment, retd executed.

5-22-73 15—Fld NOT OF APPEAL; Designation of Record on Appeal; & Certification of continuing eligibility re in Forma Pauperis. (T)

6-15-73 Fld orig & 3 cpys reporter's transcripts.

6-20-73 Mld Clerk's Record t/w Reporter's Transcript to USCA

7-13-73 16—Fld mot to supplement Record on Appeal. Fld stip & ORD that deft's mot to suppress the aliens found in stop of deft's car, may be heard @ time of trial w/ ord thereon. (T)

7-13-73 Mld Supplemental Clerk's Record to USCA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

November 1972 Grand Jury

UNITED STATES OF AMERICA, PLAINTIFF, v. FELIX HUMBERTO BRIGNONI-PONCE, DEFENDANT.	No. 14805 Criminal INDICTMENT Title 8, U.S.C., Sec. 1324(a)(2)—Illegal Transportation of Aliens

The grand jury charges:

COUNT ONE

On or about March 11, 1973, within the Southern District of California, defendant

FELIX HUMBERTO BRIGNONI-PONCE

knowing that an alien, namely,

Elsa Marina Hernandez-Serabia

was then in the United States in violation of law and having reasonable grounds to believe that said alien's entry into the United States occurred less than three years prior to the aforesaid date, did transport and move, and attempt to transport and move, said alien(s) within the United States, in furtherance of such violation of law; in violation of Title 8, United States Code, Section 1324(a)(2).

COUNT TWO

On or about March 11, 1973, within the Southern District of California, defendant

FELIX HUMBERTO BRIGNONI-PONCE

knowing that an alien, namely,

Josie Nunez-Ayala

was then in the United States in violation of law and, having reasonable grounds to believe that said alien's entry into the United States occurred less than three years prior

to the aforesaid date, did transport and move, and attempt to transport and move, said alien within the United States, in furtherance of such violation of law, in violation of Title 8, United States Code, Section 1324(a)(2).

A TRUE BILL:

Leo H. Johnson
Foreman

/s/ Harry D. Steward
HARRY D. STEWARD
United States Attorney

EXCERPTS FROM THE TRIAL TRANSCRIPT

* * * * *

DIRECT EXAMINATION OF TERRANCE J. BRADY

* * * * *

By MR. SHANAHAN:

Q. Mr. Brady, what is your occupation?
A. Border Patrol Agent.
Q. And how long have you been so employed?
A. Four and a half years.
Q. And as a Border Patrol Agent, what are your duties?
A. To protect and prevent the illegal entry of aliens and smuggling of aliens into the United States.
Q. And were you so employed on March 11, 1973?
A. I was.
Q. And where were you so employed, sir?
A. San Clemente station, California.
Q. And were you on duty on that particular day?
A. I was, sir.
Q. And what were your duties on that particular day?
A. We were observing traffic. Due to the checkpoint, which we usually check traffic on the highway was closed, we were observing traffic passing through the checkpoint area.
Q. Now, where is that area you just referred to?
A. It's on the highway about four miles south of the City of San Clemente.
Q. What highway?
A. Interstate Highway 5.
Q. And you were observing traffic heading in which direction?
A. Northbound.
Q. And you mentioned that the checkpoint is usually in operation. Would you explain what the checkpoint is, and how it is set up when it is in operation?
A. The San Clemente station, the Border Patrol is a traffic check operation, and we check the northbound traffic, routine immigration inspection as to citizenship of the occupants, and we search the vehicles for illegal aliens.
Q. This is when the checkpoint is in operation?
A. Yes, sir.
Q. Do you stop traffic there?
A. Yes, sir. They come to a complete stop.

Q. Is there some type of building or structure that is visible when the checkpoint is in operation?

A. There are three signs that warn the motorists to stop for inspection ahead.

Q. Is there anything to indicate to the motorist whether or not the checkpoint is in operation?

A. Yes, sir. Flashing lights, and the signs which indicate for the motorist to come to a stop.

Q. Is there any type of van, or anything like this, that you use at the checkpoint?

A. We place two vehicles on the highway in the lanes, when we are checking two lanes; and, then, they are facing south, and they have red lights flashing.

Q. Again, this is when the checkpoint is in operation?

A. Yes, sir.

Q. On this particular day, were any of these lights on, or the vans out in the road at that point?

A. No, sir.

Q. Now, how often is the checkpoint in operation on a normal basis?

A. Constantly.

Q. As I understand it, it wasn't in operation at this time. When is the checkpoint not in operation?

A. Due to lack of manpower and inclement weather.

Q. What was the weather like on this particular day?

A. It was inclement weather.

Q. And is this the normal procedure that you don't have it up on inclement weather?

A. Yes, sir. Never on inclement weather.

Q. Now, where were you in relation to the checkpoint?

A. We stand off of the highway right at the checkpoint in patrol cars observing the northbound traffic.

Q. And was anyone else with you?

A. Agent Harkins.

Q. And what did you observe during this period? Did you observe anything unusual?

A. We observed the cars traveling north, and we observed a Chevrolet going through that we wished to inspect.

Q. Approximately what time was this?

A. I don't recall. It was during the darkness.

Q. Early evening hours, is that correct?

A. I believe so.

Q. And what did you do?

A. We pursued the vehicle and stopped it.

Q. And what happened when you stopped the vehicle?

A. Agent Harkins approached the driver's side, and I stood back to—for his protection backing him up on the right rear portion of the vehicle.

Q. How many people were in the vehicle?

A. Three.

Q. And after Agent Harkins went to the driver, what did you do?

A. I went to the passenger side and talked to the passengers in the vehicle.

Q. Without telling me what they said, was the conversation in English or Spanish?

A. Spanish.

Q. With both people?

A. With both people.

Q. And to your knowledge, could they speak any English?

A. To my knowledge they didn't know—understand English at all.

Q. And what did you question them concerning?

A. Their citizenship.

Q. Did you request papers?

A. I did.

Q. And did you receive any papers?

A. No papers.

Q. Now, after this conversation—let me back up a little bit.

Did you observe the driver?

A. Yes, sir.

Q. And would you recognize the driver if you saw him in court again?

A. I would, sir.

Q. And if you see the driver in this courtroom, point him out and describe what he is wearing.

A. He's seated at defense table, to the left side of the counsel.

THE COURT: May the record reflect the identification of the defendant by the witness.

MR. SHANAHAN: Thank you, your Honor.

By MR. SHANAHAN:

Q. All right. After having these conversations, what did you do?

A. I established that the two passengers were in the United States illegally.

MR. RAGEN: Your Honor, I would object to that, and move it be stricken. It's hearsay.

THE COURT: Overruled.

By MR. SHANAHAN:

Q. What did you do after you had this conversation?

A. After I established that they were illegal aliens in the United States, I stepped to the rear of the vehicle where the defendant was standing with Agent Harkins, where they were inspecting the trunk; and I warned the defendant as to his rights.

Q. And what rights were those?

A. They are Miranda rights.

Q. All right. Do you have some type of card, or something that you used to give those rights?

A. Yes, sir.

Q. And after—after you gave these rights, what occurred?

A. We placed the defendant in custody, and the passengers in his vehicle in custody, and returned them to the San Clemente Border Patrol station.

Q. Had you ever seen the defendant on prior occasions?

A. I don't recall.

MR. SHANAHAN: I have no further questions at this time, your Honor.

THE COURT: Cross-examine.

CROSS-EXAMINATION

By MR. RAGEN:

Q. Agent Brady, what was the reason you stopped the car?

A. Routine immigration inspection.

Q. You said there was nothing unusual about it, other than it was traveling north, is that correct?

A. That's true.

Q. What type of car was this?

A. Chevrolet.

Q. Chevrolet. Do you know what year that was?

A. I think I recall that it was a 1969 Chevrolet.

Q. Could you see the occupants of the car from your position on the roadway?

A. Yes, sir.

Q. You could see inside the car?

A. Yes, sir.

Q. Did you use a light to do that?

A. None, other than the headlights of the patrol car.

Q. If I understand you correctly, then, your car is parked at a ninety degree angle to the freeway?

A. Yes, sir.

Q. And so as cars drive by your lights shine in?

A. Yes, sir.

Q. Did these people inside the car appear to be of Mexican descent to you?

A. Yes, sir.

Q. And that, if there was any, appeared to be the reason that you stopped them?

A. Yes, sir.

Q. Did you attempt to speak with the passengers in this car in English?

A. When I approached the right side, identified myself as an immigration officer; and, then, I asked them their citizenship in English, and that is routine.

Q. And what was their response?

A. They didn't understand English.

Q. They said that?

A. In Spanish.

Q. I see. And you indicated you used a card to advise them of their rights?

A. Yes. Well, it's a paper in English and in Spanish.

Q. Did you hand that to the defendant, Mr. Brignoni, or did you read it to him?

A. I read it to him.

Q. Do you have that card here today?

A. Yes, sir.

Q. Is that a card that is assigned to you that you keep on your person at all times?

A. Yes, sir.

MR. RAGEN: I have nothing further, your Honor.

• • • • •

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

(HON. HOWARD B. TURRENTINE)

UNITED STATES OF AMERICA, PLAINTIFF, v. FELIX H. BRIGNONI, DEFENDANT.	Criminal No. 14805 STIPULATION AND ORDER

It is hereby agreed by and between the parties and their counsel that the defendant's motion to suppress the aliens found in the stop of defendant's car, which motion is based upon the dissenting opinion in *United States v. Almeida-Sanchez*, 452 F.2d 459 (9th Cir. 1971), may be heard at the time of trial.

Dated:

/s/ Donald F. Shanahan
DONALD F. SHANAHAN
Assistant United States Attorney

/s/ Frank J. Ragen
FRANK J. RAGEN
Federal Defenders of San Diego, Inc.
Attorneys for Defendant

The above motion to suppress is denied.

Dated: JUL 13, 1973

/s/ Howard B. Turrentine
HOWARD B. TURRENTINE
United States District Court Judge

[JUDGMENT AND COMMITMENT]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
CALIFORNIA

UNITED STATES OF AMERICA v. FELIX HUMBERTO BRIGNONI-PONCE	No. 14805—Criminal

On this 14th day of May, 1973 came the attorney for the government and the defendant appeared in person and by counsel, Frank Ragen of Federal Defenders,

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty has been convicted of the offense of illegal transportation of aliens, in violation of 8 USC 1324(a)(2), as charged in count 1 and 2 of the indictment in two counts, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that on count #1 the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FOUR (4) YEARS and pursuant to 18 USC 4208(a)(2), the Court specifies that the defendant shall become eligible for parole at such time as may be determined by the Board of Parole, and on count number two the imposition of sentence is suspended and the defendant placed on probation for a period of FIVE (5) years, on condition that he obey all laws, Federal, State, or Municipal, that he comply with all lawful rules and regulations of the Probation Department. The period of probation is to commence upon the defendant's release from confinement or parole, whichever comes first.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Mar-

shal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Howard B. Turrentine
HOWARD B. TURRENTINE
United States District Judge.

Filed: May 14, 1973
William W. Luddy

By: Richard I. Bellman,
Deputy Clerk.

United States Court of Appeals for the Ninth Circuit

No. 73-2161

UNITED STATES OF AMERICA, APPELLANT

v.

FELIX HUMBERTO BRIGNONI-PONCE, APPELLANT

OPINION

[Decided June 14, 1974]

Appeal from the United States District Court for the Southern District of California

Before CHAMBERS, MERRILL, KOELSCH, BROWNING, DUNIWAY, ELY, HUFSTEDLER, WRIGHT, TRASK, CHOY, GOODWIN, WALLACE, and SNEED, *Circuit Judges.*

GOODWIN, *Circuit Judge:* Felix Humberto Brignoni-Ponce appeals his conviction for transporting aliens in violation of 8 U.S.C. § 1324(a)(2). Two illegal aliens were discovered following a warrantless stop of his car near the San Clemente immigration checkpoint. The government contends that even if recent decisions by the Supreme Court and this court have stripped the Border Patrol of its authority to stop vehicles and search them for aliens, the Border Patrol still retains the authority, exercised in this case, to stop and interrogate any person believed to be an alien as to his right to remain in the United States. We reject that contention and reverse the conviction.

On March 11, 1973, the San Clemente immigration checkpoint, located in San Onofre, California, approximately 65 miles north of the Mexican border on Interstate 5 between San Diego and Los Angeles, was closed because of inclement weather. During the early morning hours, an agent of the Border Patrol was observing northbound traffic from his patrol car, parked at a ninety-degree angle to the interstate highway. Observing a passing vehicle whose occupants appeared to be of Mexican descent, the agent pursued the car and stopped it. Investigation soon revealed that the

two passengers were illegally in the United States. They and the driver, Brignoni-Ponce, were then arrested.

In *United States v. Peltier*, F. 2d (9th Cir., May 9, 1974) (en banc), this court held that the rule announced by the Supreme Court in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), applied retroactively to all cases involving roving-patrol searches which were pending on appeal at the time that *Almeida-Sanchez* was announced. However, in *United States v. Bowen*, F. 2d (9th Cir., May 9, 1974) (en banc), we also held that, although searches by border-patrol agents at fixed checkpoints violated the Fourth Amendment, *Almeida-Sanchez* would not be applied retroactively to fixed-checkpoint searches conducted prior to the date of decision of *Almeida-Sanchez*.

The stop of Brignoni-Ponce's car was made before the decision in *Almeida-Sanchez* was announced. The first question, then, is whether or not the stop was more like one by a roving patrol than one at a fixed checkpoint. Although we held in *United States v. Morgan*, F. 2d (9th Cir., June 14, 1974) (en banc), that searches at the San Clemente checkpoint were fixed-checkpoint searches rather than roving-patrol searches, Brignoni-Ponce's car was not stopped at the checkpoint. Rather, because the checkpoint was closed and no marked barricades designed to impede vehicular traffic were in place, Brignoni-Ponce would have proceeded undisturbed except for the decision to pursue him. His car was overtaken and stopped north of the closed checkpoint. Although the line between a roving-patrol stop and a fixed-checkpoint stop is not a clear one, we hold that pursuing a passing car and flagging it to the side of the road is conduct more characteristic of a roving-patrol stop than of a fixed-checkpoint stop. *See United States v. Grijalva-Carrera*, F. 2d (9th Cir., June 14, 1974) (en banc); *United States v. Bowen*, F. 2d at (slip opinion at 4-5).

The government contends, however, that even if this court holds that the stop was a roving-patrol stop, that holding would not dispose of this case. It argues that *Almeida-Sanchez*, *Peltier*, *Bowen*, *Morgan*, and *Grijalva-Carrera* all involved the constitutionality of searches without probable cause, pursuant to 8 U.S.C. § 1357(a)(3). This case, by contrast, involves merely a stop, pursuant to 8 U.S.C. § 1357(a)(1), for the purpose of interrogating a person believed to be an alien regarding his right to remain

in the United States. In support of its argument, the government cites the recent decision by the Court of Appeals for the Tenth Circuit in *United States v. Bowman*, 487 F. 2d 1229 (10th Cir. 1973), holding that *Almeida-Sanchez* applied only to searches under § 1357(a)(3) and not to stops for interrogation under § 1357(a)(1).

We cannot adopt the approach taken by our brothers on the Tenth Circuit. Section 1357(a)(1), unlike § 1357(a)(3), has no requirement that the stop be within a "reasonable distance" from the border. Under the Tenth Circuit's view, immigration officials could stop a vehicle anywhere in the country in order to interrogate its occupants as to their right to be in the United States, without a warrant, without probable cause, and without even a reasonable suspicion that any of the occupants are illegal aliens.

Such stops are entirely inconsistent with the Supreme Court's opinion in *Almeida-Sanchez*. Although the facts of *Almeida-Sanchez* called into question only that portion of § 1357(a) involving the Border Patrol's authority to stop and search vehicles, the Court's opinion reflects at least as much concern with the initial stop as with the subsequent search. *See, e.g.*, 413 U.S. at 268:

> "* * * It is undenied that the Border Patrol had no search warrant, and that there was no probable cause of any kind for the *stop* or the subsequent search * * *." (Emphasis added.)

And 413 U.S. at 272:

> "* * * [N]either this Court's automobile search decisions nor its administrative inspection decisions provide any support for the constitutionality of the *stop* and search in the present case * * *." (Emphasis added.)

The Court ended its opinion, 413 U.S. at 274-75, by quoting from *Carroll v. United States*, 267 U.S. 132 (1925), as follows:

> "* * * It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be stopped in crossing an interna-

> tional boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise * * *." 267 U.S. at 153-54.

Had the Court intended to leave intact the government's asserted right to stop cars on mere suspicion anywhere in the country in order to interrogate their occupants as to their right to remain in the United States, we doubt that it would have quoted this language from *Carroll*. Even more than immigration searches which had to be conducted within an area no more than 100 miles from the border, these immigration stops offend the "right to free passage without interruption" of "those lawfully within the country."

Moreover, the Tenth Circuit's position is inconsistent with settled law of this circuit. In *United States v. Mallides*, 473 F. 2d 859, 861 (9th Cir. 1973), we held that the stop of a vehicle by police officers, even for the limited purpose of questioning its occupants, must be based upon a "founded suspicion." *See also United States v. Ward*, 488 F. 2d 162, 168-69 (9th Cir. 1973) (en banc). This holding was subsequently applied to investigatory stops by border-patrol agents. *See, e.g., United States v. Mora-Chavez*, — F. 2d — (9th Cir., Apr. 26, 1974); *United States v. Bugarin-Casas*, 484 F. 2d 853, 854 (9th Cir. 1973), *cert. denied*, — U.S. — (1974).

Likewise, the Court of Appeals for the District of Columbia Circuit has held that immigration officials, in accordance with § 1357(a)(1), may make forcible detentions of a temporary nature for the purposes of interrogation under circumstances creating a reasonable suspicion, not arising to the level of probable cause to arrest, that the individual so detained is illegally in this country. *Au Yi Lau et al. v. United States Immigration & Naturalization Service*, 445 F. 2d 217, 223 (D.C. Cir.) (later vacated as to one party only), *cert. denied*, 404 U.S. 864 (1971).

Here, the border-patrol agents who stopped Brignoni-Ponce's car did not possess facts which constituted a founded suspicion that he or his passengers were illegal aliens. All that they knew was that Brignoni-Ponce and his companions appeared to be of Mexican descent and were in a sedan traveling north on Interstate 5, approximately 65 miles north of the Mexican border. This is not enough. As we said in *United States v. Mallides*:

> "* * * [T]here is nothing suspicious about six persons riding in a sedan. The conduct does not become suspicious simply because the skins of the occupants are nonwhite * * *." 473 F. 2d at 861.

We hold, then, that the stop and interrogation of Brignoni-Ponce and the passengers in his car were illegal, and the fruits of the illegal conduct were inadmissible. *See United States v. Guana-Sanchez*, 484 F. 2d 590 (7th Cir. 1973), *petition for cert. filed* November 23, 1973 (U.S. No. 73-820).

Reversed and remanded.

United States Court of Appeals For the Ninth Circuit

No. 73-2161, DC No. 14805

UNITED STATES OF AMERICA, APPELLEE

v.

FELIX HUMBERTO BRIGNONI-PONCE, APPELLANT

JUDGMENT

Appeal from the United States District Court for the Southern District of California.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is

Reversed and Remanded.

A true copy
Attest June 20, 1974.

EMIL E. MELFI, Jr.,
Chief Deputy and Acting Clerk.

RAY HEWITT,
Senior Deputy.

Filed and entered June 14, 1974.

SUPREME COURT OF THE UNITED STATES

No. 74-114

UNITED STATES,
Petitioner,

v.

FELIX HUMBERTO BRIGNONI-PONCE

ORDER ALLOWING CERTIORARI. Filed October 15, 1974

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth ..... Circuit is granted, and the case is set for oral argument in tandem with No. 73-2050 and No. 73-6848.

☆ U.S. Government Printing Office: 1974—563-035/64